ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION II

CA08-178

December 31, 2008

JERRY MEASEL APPELLANT	AN APPEAL FROM SALINE COUNTY CIRCUIT COURT
v.	[NO. CV2006-150-3]
GUIDEONE ELITE INSURANCE CO. APPELLEE	HONORABLE GRISHAM PHILLIPS, JUDGE AFFIRMED

Appellant Jerry Measel was injured on the premises of Spring Creek Baptist Church in Benton, where he was a long-time member. He sued the church's liability carrier, appellee Guideone Elite Insurance Co., alleging that his injuries were proximately caused by the church's negligence.[1] Following a trial, the jury returned a general verdict for Guideone. Measel appeals and argues that the trial court erred in 1) denying his motion for a directed verdict on comparative fault; 2) refusing to instruct the jury on *res ipsa loquitur*; and 3) admitting certain photographs into evidence. We affirm.

[1]A plaintiff who alleges injury by a charitable entity may file a direct action against the entity's liability insurer. Ark. Code Ann. § 23-79-210 (Supp. 2007); *Sowders v. St. Joseph's Mercy Health Ctr.*, 368 Ark. 466, 247 S.W.3d 514 (2007).

The facts are virtually undisputed. Measel was scheduled to meet Music Director Shawn Crane at the church on Monday, January 31, 2005. When he arrived, Crane was not in the administrative office, so Measel decided to search for him. He walked from the lighted office into a dark hallway and closed the door behind him. He searched for a light switch, which was on his right, but he could not find it. He then walked a short distance to the bottom of a staircase. Measel did not check for light switches at this location, but there were two on his left at the bottom of the stairs. Thinking he saw a small light that might lead him to Crane, he began to climb the fairly long staircase. The area was unfamiliar to him, and he later told his wife he could not see anything as he headed upstairs. At the top landing, Measel paused to get his bearings. He was still in the dark—a stained glass window, which would have let natural light into the area, had been covered the day before to allow the congregation to view a video program. After a moment, Measel thought he could see the same light he saw earlier and proceeded through a room to his left. He took only a few steps and fell into the church's baptistry, which was recessed into the floor and had no water in it. Measel sustained a broken wrist and a broken leg.

At trial, Pastor Carl Richey testified that the area where Measel walked was not typically used by members on a daily basis, but it was not restricted. He further testified that the church could have placed a door or other barrier across the baptistry entry or could have covered the baptistry. He recalled that Music Director Shawn Crane had once placed a makeshift barrier at the baptistry entrance to prevent his young children from playing in it. Pastor Richey also said that he considered Measel an honest individual and that it was reasonable to conclude he did not see the light switches in the dark. However, he said that,

when the stairwell lights were turned on, the baptistry could clearly be seen from the top of the stairs. Measel testified in a deposition that he thought the accident would never have happened if he had found a light switch.

Measel's expert witness, environmental safety consultant Derek Jennings, said that an accident was foreseeable in the baptistry area and that the absence of a barrier or floor covering violated OSHA regulations. Guideone's expert, architect Gordon Duckworth, testified that the baptistry area did not violate building codes. However, he said, the church should have done more to protect the area, such as using a barrier or restricting access.

At the close of the plaintiff's case and the close of all evidence, Measel moved for a directed verdict on comparative fault, which the trial court denied. Measel now argues that the denial was in error.

In reviewing the denial of a motion for a directed verdict, we determine whether the jury's verdict is supported by substantial evidence. *Stewart Title Guar. Co. v. Am. Abstract & Title Co.*, 363 Ark. 530, 215 S.W.3d 596 (2005). Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. *Id.* On appeal, we do not try issues of fact; rather, we simply review the record for substantial evidence to support the jury's verdict. *See id.* In determining whether there is substantial evidence, we view the evidence and all reasonable inferences arising therefrom in the light most favorable to the party on whose behalf judgment was entered. *Id.*

Measel contends that, as an invitee, he was entitled to the church's protection from dangerous pitfalls or obstructions. However, the question is not whether the church was negligent but whether there was substantial evidence of Measel's negligence. Our

comparative-fault statute provides that a plaintiff cannot recover damages if his own fault is equal to or greater than the defendant's. *See* Ark. Code Ann. § 16-64-122(b)(2) (Repl. 2005). Comparative fault is typically a matter for the jury to decide, *see Wingate Taylor-Maid Transp., Inc. v. Baker*, 310 Ark. 731, 840 S.W.2d 179 (1992), and the defendant has the burden of proving the plaintiff's fault. *See Bell v. Misenheimer*, 102 Ark. App. 389, ___ S.W.3d ___ (2008). A directed verdict is improper if there is substantial evidence that the plaintiff was negligent. *See Garrett v. Brown*, 319 Ark. 662, 893 S.W.2d 784 (1995).

It is well established that a person is negligent if he does something that a reasonably careful person would not do, or fails to do something that a reasonably careful person would do under the circumstances. *See Misenheimer*, *supra*. The jurors in this case may well have found that a reasonably careful person would not, as Measel did, walk down a hallway, up a flight of stairs, and into an unfamiliar room in complete disregard of the darkness. Accordingly, they may have concluded that Measel's injuries were proximately caused, in part, by his own conduct.

Measel argues, however, that a key element of negligence—foreseeability—is missing in this case because he had no reason to anticipate any danger in his path. *See Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003) (stating that a party has no duty to guard against risks he cannot reasonably foresee); *First Elec. Coop. Corp. v. Pinson*, 277 Ark. 424, 642 S.W.2d 301 (1982) (recognizing there is no negligence in failing to guard against a danger that a person has no reason to anticipate). We disagree. It was not necessary that Measel know the precise harm that would befall him or the exact manner in which his injury would occur in order to be deemed negligent; rather, it was only necessary that he reasonably

foresee an appreciable risk of harm. *See Coca-Cola*, *supra*. *See also Jordan v. Adams*, 259 Ark. 407, 533 S.W.2d 210 (1976). Here, Measel walked from a lighted space into a darkened one; closed a door that would have shed light into the area; proceeded for a considerable distance through the darkness, including up a long staircase where he could not see; and walked across a darkened room. Furthermore, the area that Measel traversed was unfamiliar to him. Common sense and experience dictate that, under these circumstances, Measel should reasonably have foreseen an appreciable risk of harm to himself. Where a plaintiff demonstrates a lack of good judgment in the face of a known danger, he may be held partly to blame for his own injuries. *See Turner v. Stewart*, 330 Ark. 134, 952 S.W.2d 156 (1997). We therefore hold that there was substantial evidence of Measel's negligence and that the trial court was correct in denying the motion for a directed verdict.

Next, Measel argues that the trial court erred in refusing to instruct the jury on *res ipsa loquitur*. However, *res ipsa loquitur* does not apply where "all other responsible causes, such as the conduct of the plaintiff . . . are not sufficiently eliminated." *Barker v. Clark*, 343 Ark. 8, 14, 33 S.W.3d 476, 481 (2000). *See also Gann v. Parker*, 315 Ark. 107, 865 S.W.2d 282 (1993); *Marx*, *supra*. Having determined that substantial evidence of Measel's fault existed in this case, we see no basis for reversal on this point.

Measel's final argument concerns the trial court's admission of seven photographs of the church's hallway, stairway, and baptistry room into evidence. The pictures show the areas as well-lit, which caused Measel to object that they did not fairly and accurately represent the darkened conditions he faced on the day he was injured. The court overruled his objection but gave the following limiting instruction:

> I'm going to allow the defense to show you these exhibits at this time, but I want to give you an admonition before you look at them. None of the exhibited photographs in this series, defendant's 2 through 8, are being offered to show the scene as Mr. Measel would have seen it on the date of the accident.

Measel argues on appeal that the photographs were confusing and unfairly prejudicial.

We will not reverse the trial court's admission of evidence absent an abuse of discretion. *McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007). Here, the trial court plainly instructed the jury that the photographs did not depict the conditions Measel encountered on the day of the accident. Further, there was abundant testimony, undisputed throughout the trial, that Measel walked through darkness on the day in question. That fact was essential to both parties' theory of the case. Additionally, Measel's counsel made a point of stating several times while examining witnesses that Measel proceeded through darkness and not through a lighted area, as shown in the pictures. Under these circumstances, we see little possibility for confusion or unfair prejudice.

We also do not agree that *McMickle*, *supra*, and *Carter v. Missouri Pacific Railroad Co.*, 284 Ark. 278, 681 S.W.2d 314 (1984), warrant reversal. In those cases, our supreme court reversed the admission of visual depictions of an accident scene because they were not substantially similar to the circumstances surrounding the accident. However, those visual depictions were attempts to recreate or reconstruct the original accident scene. Here, the photographs were used as an explanatory device to familiarize the jury with the church's interior and demonstrate that the light switches in Measel's path were situated in the ordinary, expected locations.

Affirmed.

HART and ROBBINS, JJ., agree.